

**CERTIFIED FOR PARTIAL PUBLICATION\***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

MARK LEWIS et al, Plaintiffs and Appellants, v. JOHN CRANE, INC., Defendant and Appellant.	A092213  (San Francisco County Super. Ct. No. 306774)
MARK LEWIS et al, Plaintiffs and Respondents, v. JOHN CRANE, INC., Defendant and Appellant.	A093411

A jury awarded plaintiffs Mark Lewis and his wife, Shirley Hackett, \$2.3 million in damages arising from Lewis's shipyard exposure to asbestos products manufactured by John Crane, Inc. (Crane). Crane seeks reversal of the judgment, contending that it resulted from jury misconduct, prejudicial errors in the admission of evidence, and an improper special verdict form. In the alternative, Crane contends that the trial court miscalculated the amount of the offset it was entitled to for plaintiffs' pre-verdict settlements and improperly awarded expert witness fees to Ms. Hackett. Plaintiffs cross-appeal, asserting that Crane's settlement offset was overstated.

---

\* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II.A., II.B., II.C. and II.E.

We modify the judgment to reduce Crane's settlement credit against Lewis's economic damages by \$33,367 and affirm it in all other respects. We also affirm the order awarding expert witness fees.

## **I. BACKGROUND**

Lewis worked for the Navy at the Mare Island Naval Shipyard from 1971 until 1995. From 1971 to 1977 he was employed as a pipefitter working on nuclear submarines and surface craft. From 1977 until 1987 he worked as a quality assurance inspector in the nuclear inspection division. Between 1987 and 1995 he worked as an inspector leader, and then as a supervisor in the inspection division.

Lewis's duties as a pipefitter included removing and replacing asbestos-containing packing materials used to seal valves and gaskets used to seal pipe joints. Such tasks were routinely performed as part of the process of overhauling submarines and surface vessels brought to Mare Island. As an inspector and supervisor, Lewis was present from time to time observing others removing and installing asbestos-containing packing materials and gaskets. While working as a pipefitter, Lewis also handled asbestos-containing thermal insulation materials and worked alongside insulators who were removing and applying such materials to pipes. Much of the pipefitting and insulation work took place in confined spaces where pipefitters and insulators worked in close proximity. Lewis did not wear a respirator or protective clothing. Mr. Lewis smoked cigarettes for 29 years, quitting in 1994.

Crane sold asbestos packing materials and gaskets to the Navy. Crane's products were commonly used at Mare Island and were present in ships on which Lewis worked. There was testimony that Crane's packing products were the predominant brand of packing used at Mare Island. Lewis was also exposed to asbestos-containing packing materials, gaskets, and insulation furnished by many other manufacturers, including Garlock, Owens-Corning, and Johns-Manville.

Lewis began to exhibit symptoms of lung disease in April 1998. Diagnostic tests indicated that Lewis had mesothelioma, an invariably fatal form of cancer caused by asbestos exposure. Medical experts and treating physicians called by Lewis testified that

they believed Lewis had mesothelioma to a high degree of medical certainty. More invasive tests that could have definitively established this diagnosis were not performed because the cancer had progressed so far that the risks associated with such tests outweighed the benefits.

At the time of his diagnosis, Lewis was 50 years old. He had been married to Shirley Hackett for 16 years. Lewis and Hackett had an eight-year-old son, and Lewis also had a 25-year-old son by a prior marriage.

Lewis and Hackett sued Crane and dozens of other companies involved in the use, distribution, or manufacturing of asbestos-containing products, seeking damages for Lewis's personal injury and Hackett's loss of consortium. Prior to trial, plaintiffs settled with more than 30 of the defendants for sums totaling \$4,592,248. The settlement agreements included language purporting to release the settling defendants from all claims arising from Lewis's exposure to asbestos, including potential future wrongful death claims by his heirs, and an undertaking by Lewis to hold such defendants harmless from any loss or damage caused by the bringing of such claims.

Plaintiffs proceeded to a jury trial against Crane on the theory that its asbestos-containing products were defective in design in that they failed to meet the ordinary consumer's expectation of safety and were a substantial factor in causing Lewis's illness. Crane presented testimony disputing Lewis's evidence that his illness was asbestos-related mesothelioma, and disputing whether Crane's products were unsafe or could have been a substantial source of Lewis's asbestos exposure.

After a five-week trial, the jury found Crane liable and determined that Lewis had incurred \$1,696,132 in economic damages and \$2 million in noneconomic damages as a result of his illness. Hackett's noneconomic damages for loss of consortium were found to be \$1,250,000. The jury determined that Crane's comparative fault for the plaintiffs' noneconomic damages was 18.5 percent. Crane's motions for a new trial and for judgment notwithstanding the verdict were denied. The trial court ruled that Crane was entitled to a credit of \$1,072,657 against Lewis's economic damages based on plaintiffs' pre-verdict settlements.

Crane timely appealed from the judgment and ensuing orders (A092213), and filed a separate appeal (A093411) from a posttrial order awarding expert witness fees to Hackett. Plaintiffs cross-appealed in A092213 from the order establishing Crane's settlement credit. Before the close of briefing, we consolidated the appeals and cross-appeal for oral argument and decision.

## **II. DISCUSSION**

### **A. Jury Misconduct\***

Crane contends that a comment made by one of the jurors during deliberations so tainted the jury's deliberations that the judgment must be reversed. Based on our independent review of the record, we find that the trial court properly rejected Crane's motion for a new trial on this ground.

Once the jury found liability on Crane's part, the special verdict form required the jurors to assign percentages of comparative fault to Lewis, Crane, the Navy and all other entities that contributed to Lewis's injury. According to juror declarations obtained by Crane after the trial, the jurors first decided that 60 percent of the fault should be assigned to "all others" and that the remaining 40 percent must be divided between Crane and the Navy.<sup>1</sup> Initially the jurors were far apart on how to allocate the 40 percent. Some jurors wanted all or most of the 40 percent allocated to Crane and others wanted all or most of it allocated to the Navy. Juror Hernandez, who supported a full 40-percent allocation to Crane, commented that the Navy would not pay Lewis anything, implying that assigning too high a percentage of fault to the Navy would limit Lewis's recovery. Approximately one hour after this comment was made, the jury voted nine-to-three to assign 18.5 percent of fault to Crane and 21.5 percent to the Navy.

---

\* See footnote, *ante*, page 1.

<sup>1</sup> We disregard those portions of the juror declarations in which the jurors purport to explain their own mental process or that of other jurors in arriving at a verdict. (Evid. Code, § 1150, subd. (a); *Andrews v. County of Orange* (1982) 130 Cal.App.3d 944, 958-959, disapproved on another point in *People v. Nesler* (1997) 16 Cal.4th 561, 582, fn. 5.)

Crane moved for a new trial, claiming that the verdict was influenced to its prejudice by improper speculation as to whether the Navy would pay damages to Lewis. Lewis submitted other juror declarations in opposition to the motion. These counterdeclarations stated that, as soon as Hernandez made his comment, the jury foreperson and other jurors responded that the jury had to focus on Crane's percentage of fault and not worry about the Navy. According to the counterdeclarations, neither Hernandez nor any other juror brought up the issue again. Three further votes were taken before nine jurors, including Hernandez and at least two other jurors who had previously supported a higher allocation to Crane, voted for a compromise amount of 18.5 percent.

Jury misconduct must be based on something more than a juror's stray remark. "If transient comments made in the heat of discussion during deliberations become a potential vehicle for attacking the verdict of the jury, freedom of discussion in the jury room is chilled, and the free exchange of ideas is inhibited." (*Tillery v. Richland* (1984) 158 Cal.App.3d 957, 977.) Put another way, "[j]urors are not automatons. . . . If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias. To demand theoretical perfection from every juror during the course of a trial is unrealistic." (*In Re Carpenter* (1995) 9 Cal.4th 634, 654-655.)

Here, the foreperson and other jurors reacted swiftly to juror Hernandez's passing remark, pointing out that whether the Navy would pay was not relevant to determining Crane's percentage of fault. There is no credible evidence that Hernandez made any further attempt to press this point or that he was influenced by it himself.<sup>2</sup> In fact, Hernandez moved from advocating that the full 40 percent should be allocated to Crane to voting for the 18.5 percent figure adopted by the jury. The remark also did not break a

---

<sup>2</sup> One juror, who signed three declarations for the parties, stated in his last declaration that Hernandez continued to make statements about the Navy throughout the deliberations on this issue. However, his earlier declarations failed to mention this and in fact he stated that Hernandez raised his concern about the Navy not paying "at one point" during the deliberations. No other juror declaration stated that Hernandez raised the point more than once or that he made any effort to convince other jurors.

deadlock or change the dynamics of the jury's deliberations.<sup>3</sup> The jurors continued discussing different numbers and taking votes for another hour before nine votes could be obtained for a single figure.

On this record, we cannot say that Hernandez's passing remark rises to the level of jury misconduct. Even if it did, we find no substantial likelihood of harm to Crane. "In reviewing the record to independently determine whether the act of jury misconduct, if it occurred, was prejudicial to appellant's right to a fair trial, we consider (1) the strength of the evidence that misconduct occurred, (2) the nature and seriousness of the misconduct, and (3) the probability that actual prejudice may have ensued. [Citation.]" (*English v. Lin* (1994) 26 Cal.App.4th 1358, 1368.) Here, the fact that Hernandez's remark was quickly squelched, and did not result in any extended discussion of improper factors, militates against any inference of actual prejudice. (*Id.* at pp. 1365-1366.) The fact that Hernandez himself voted for a significantly lower allocation to Crane after making the comment also tends to negate any claim that the improper concern he raised influenced him or persuaded other jurors to rally to his position.

We conclude that no substantial likelihood of harm to Crane from the alleged act of misconduct has been shown in light of the record as a whole.

### **B. Special Verdict Forms<sup>\*</sup>**

Crane contends that it was prejudiced by two trial court errors in the design of the special verdict form. First, the verdict form erroneously failed to require the jurors to expressly determine whether Mark Lewis had an injury caused by exposure to asbestos. Second, the verdict form was improper because it did not name all other potentially liable

---

<sup>3</sup> Two declarants claimed that some of the other jurors nodded or expressed agreement in some fashion with Hernandez's remark when he made it, but no other juror who agreed with him was identified. There is no evidence whatsoever that the jury engaged in an extended discussion about whether plaintiffs could recover from the Navy.

<sup>\*</sup> See footnote, *ante*, page 1.

manufacturers of asbestos products and require the jury to assign individual percentages of fault to each named company. We find no merit in either contention.<sup>4</sup>

The trial court followed the form of special verdict prescribed in product liability cases by BAJI No. 16.10. The verdict form approached the issue of causation by first asking the jury, “Did defendant’s product contain a defect in design?” If it answered this question in the affirmative, the jury was thereafter instructed in Question No. 4 to answer “yes” or “no” to the further question, “Was the defect a cause of injury to plaintiff?” The only evidence of a design defect in Crane’s products before the jury was their potential to release respirable asbestos fibers. Thus, although the jury was not specifically asked whether Lewis’s illness was caused by asbestos, it necessarily had to decide this question in the affirmative in order to conclude that the defect in issue was a cause of his injury. Crane’s trial counsel emphasized during closing argument that the jury must answer Question No. 4 in the negative if it believed Lewis’s illness was not caused by exposure to asbestos.

Code of Civil Procedure section 624 provides in pertinent part: “[A] special verdict is that by which the jury find[s] the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence . . . and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law.” Thus, on a challenge to the adequacy of a special verdict form, the determinative question is whether the jury has made findings on all factual issues essential to support the judgment. (See *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1288 [failure of special verdict form to require finding on passive negligence did not render it inadequate where such finding was subsumed by jury’s finding of active negligence]; *Jensen v. BMW of North America, Inc.*

---

<sup>4</sup> We reject respondents’ contention that Crane waived objection to the special verdict form when it did not insist on a ruling rejecting its earlier-proffered form. Submitting a trial brief and proposed form on the issue, absent a later express waiver, is sufficient to preserve the issue for review. (See *Alexander v. Nextel Communications, Inc.* (1997) 52 Cal.App.4th 1376, 1379, 1382.)

(1995) 35 Cal.App.4th 112, 131-132 [special verdict form not defective in failing to require specific finding as to whether defendant violated consumer law where jury's assessment of damages and finding of willful conduct implied such a finding].)

Here, the BAJI-approved form omitted no question essential to determining Crane's liability. Crane also fails to demonstrate that a juror who believed Lewis did not have an asbestos-caused injury would have been confused about how to register that belief on the form. A similar verdict form was used in *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 628, a case in which the defendant also disputed whether the plaintiff's disease was caused by asbestos exposure. The adequacy of the form was not challenged in that case. We conclude that the trial court committed no error in declining to include the question proposed by Crane.<sup>5</sup>

Respondents cite several asbestos cases arising in this appellate district in which the use of the "all others" designation or its equivalent to assign comparative fault has been accepted without issue as to its propriety. (See, e.g., *Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 170; *Gutierrez v. Cassiar Mining Corp.* (1998) 64 Cal.App.4th 148, 152.) The present case illustrates why this practice makes good sense.

Crane had the burden of proving other manufacturers' share of comparative fault for Lewis's injuries. (*Sparks v. Owens-Illinois, Inc.* (1995) 32 Cal.App.4th 461, 478.) Its proposed special verdict form would have required the jury to enter 38 separate determinations of comparative fault on the special verdict form, not including assignments of fault to Crane, Lewis and the Navy. For each company and product on the list, Crane would have had to put in evidence that the product was used at Mare Island during the time Lewis worked there; that Lewis was exposed to it; that it had a design defect; that Lewis's exposure was sufficient as a matter of medical science to increase his risk of disease; and that Lewis's relative exposure to the product compared to other

---

<sup>5</sup> Crane points out that its proposed form of instruction has been used by other trial courts. Our holding is not meant to imply that the use of such a question would have been error.

asbestos products could be quantified to a specific percentage. Plaintiffs would then have been entitled to put on opposing evidence on each of these issues for each such company and product.

Crane's proposal would thus have required the jury to hear complex evidence and render individual verdicts in 38 mini-trials in addition to the primary trial. Such a marathon undertaking, with its virtually limitless potential for creating jury confusion, would in the end yield findings wholly superfluous to the resolution of Crane's liability. The percentages of fault individually attributable to other asbestos products is immaterial. Only the total matters. The trial court committed no error or abuse of discretion in opting for a special verdict form that focused the jury's attention on this one, essential determination.<sup>6</sup>

### **C. Evidentiary Issues<sup>\*</sup>**

Crane contends that the trial court committed prejudicial error by (1) admitting evidence of "reentrainment" as a source of asbestos exposure, (2) excluding evidence that federal agencies had exempted its asbestos packing products from safety restrictions placed on other asbestos products, and (3) admitting evidence that Crane instituted warning labels on its asbestos packing products in 1983 and published a brochure describing non-asbestos packing material as "safer" than its earlier product.

---

<sup>6</sup> We reject Crane's related contention that the trial court abused its discretion in excluding deposition testimony given in 1983 by Marvin McFadden, an insulator who worked at Mare Island. In the deposition excerpts, McFadden was asked whether he recalled the names of various asbestos insulation product brands read to him by deposing counsel. He recalled many brands and did not recall many others. In most instances, McFadden was not asked how prevalent the use of the named product was nor was there testimony establishing Lewis's exposure to the same products. Since most of McFadden's testimony concerned brands used at Mare Island before Lewis worked there, and the two men performed different job duties in any event, McFadden's testimony had little probative value as to Lewis's exposure to third party asbestos products. The trial court did not abuse its discretion in excluding it.

<sup>\*</sup> See footnote, *ante*, page 1.

## Reentrainment

Crane complains that the trial court made inconsistent rulings on the admissibility of evidence that asbestos fibers deposited on clothing or surfaces can, if disturbed by contact or air currents, become reentrained into the air and inhaled. The court ruled that expert testimony regarding “studies or work simulations or experiments on reentrainment of fibers is excluded as it lacks a sufficient foundation as to its reliability in the scientific community.” At the same time the court found medical testimony that reentrainment can be a significant potential source of exposure to be admissible, as long as no attempt was made to quantify the amount of asbestos dust released.

Consistent with the court’s rulings, Lewis elicited testimony from experts called by both sides that reentrainment of asbestos fibers deposited on a worker’s clothing is well-recognized as a source of secondary asbestos exposure. All of the medical experts acknowledged known cases in which family members of workers exposed to asbestos on the job had contracted asbestos-related diseases solely from exposure to the worker’s clothing.<sup>7</sup> One pulmonary specialist called by Lewis opined that Lewis’s exposure to asbestos from clothing contributed to his mesothelioma.<sup>8</sup>

In essence, Crane’s argument is that because there is no generally accepted scientific technique for quantifying the amount of settled fiber reentrained into the air, no expert should be allowed to testify that the phenomenon occurs or poses a health risk. That is a non sequitur. There was unchallenged testimony that secondary releases occur and put respirable fibers into the breathing zone. Neither Crane’s motion in limine nor its

---

<sup>7</sup> *Franklin v. USX Corp.* (2001) 87 Cal.App.4th 615 and *ACandS, Inc. v. Abate* (Md.App. 1998) 710 A.2d 944 involved such claims. The hazard posed by reentrained fibers in buildings has also been discussed in cases dealing with insurance coverage for asbestos-related property damage. (See, e.g., *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.* (1996) 45 Cal.App.4th 1, 97-100, fn 43.)

<sup>8</sup> The court also permitted testimony quantifying the amount of asbestos that settles on clothing and surfaces during work simulation experiments. None of this testimony purported to quantify or estimate how much of this settled asbestos fiber is reentrained into the atmosphere.

witnesses offered evidence that the concept of secondary exposure posing a health risk lacks general acceptance in the relevant scientific community. Accordingly, we find no abuse of discretion in the trial court's rulings on this subject.

#### OSHA/EPA Actions

Crane sought to introduce evidence that the federal Occupational Safety and Health Administration (OSHA) had developed "permissible exposure limits" for workplace exposure to airborne asbestos fibers and that OSHA exempted Crane's asbestos packing products from warning label requirements because fiber release from its products did not exceed those limits. Crane also sought to introduce evidence of a federal Environmental Protection Agency (EPA) risk assessment reaching similar conclusions.

Lewis moved in limine to exclude such evidence under Evidence Code sections 350 and 352. Lewis argued that government standards for exposure to asbestos were irrelevant because the case was being tried under a strict liability theory. Under the consumer expectations test for determining whether Crane's product was defective, the test is whether the ordinary consumer would expect to contract an incurable lung disease from working with it, not whether Crane's conduct was reasonable or complied with federal law. Furthermore, according to Lewis, OSHA and EPA did not determine that packing materials and gaskets made with asbestos presented no health risks. The decisions simply reflected a policy determination that more aggressive regulation of these products would not produce benefits commensurate with the cost. Finally, Lewis asserted there was a substantial risk that the jury would be misled into treating the outcome of such a political process as medical evidence of product safety.

The trial court did not abuse its discretion in excluding this evidence. Evidence of compliance with governmental standards is not relevant to whether a product is defective under the consumer expectation test. Under this test, "the product must meet the safety expectations of the . . . ordinary consumer, not the industry or a government agency." (*Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 126-127.) The factfinder in a case presented under this theory may "find a manufacturer liable for defective design

even if [the product] complies with every regulation.” (*Elsworth v. Beech Aircraft Corp.* (1984) 37 Cal.3d 540, 550.)

On appeal, Crane emphasizes that the proffered evidence was also relevant on the issue of causation, i.e., to show that Crane’s products did not release enough asbestos to cause Lewis’s injury. Although we question whether Crane raised this ground below with sufficient specificity to preserve it for appellate review, it is unavailing in any event. Crane’s experts would have been barred by the hearsay rule from testifying to the contents of the regulations to prove the truth of any fact asserted therein. (See *Elsworth v. Beech Aircraft Corp.*, *supra*, 37 Cal.3d at pp. 553-554; *People v. Campos* (1995) 32 Cal.App.4th 304, 309.)<sup>9</sup>

In addition, allowing testimony regarding the content of the regulations would have thrown open the door to a host of collateral issues concerning the nature of governmental exposure standards. Crane’s experts were free to testify that the products were safe based on the same types of research and analysis that supported the government standards. The standards themselves provide only weak, hearsay evidence of product safety. While the tactical advantage to Crane in being able to call the government as its witness is manifest, the trial court acted within its discretion in concluding that the potential risk of jury confusion and undue time consumption outweighed any actual probative value the evidence had. (Evid. Code, § 352.)

---

<sup>9</sup> In its reply brief, Crane claims *Elsworth v. Beech Aircraft Corp.*, *supra*, 37 Cal.3d 540 stands for the proposition that government safety regulations may be presented to the jury and that a jury may be allowed to consider whether a manufacturer complied with them. This is a highly skewed reading of the case. The regulations in question were read by the court as part of its instructions to the jury because the plaintiff alleged that the defendant was liable on a theory of negligence per se for violating them. The regulations were not offered by a party to establish the truth of any assertion made in them.

### Crane's Warning Label and Brochure

Crane contends the trial court erred in allowing evidence that it began placing warning labels on its products in 1983 and in admitting a 1972 Crane brochure asserting that its non-asbestos products were “safer” than Crane’s asbestos products.

The warning label evidence was admissible under *Schelbauer v. Butler Manufacturing Co.* (1984) 35 Cal.3d 442 (*Schelbauer*) and *Ault v. International Harvester Co.* (1974) 13 Cal.3d 113 (*Ault*). *Ault* held that Evidence Code section 1151 does not bar evidence of subsequent remedial measures to prove that a product was defective.<sup>10</sup> (13 Cal.3d at pp. 117-121.) *Schelbauer* extended that principle to post-accident warnings given by the manufacturer. (35 Cal.3d at pp. 449-452.) Although Crane also asserts that the evidence should have been excluded under Evidence Code section 352, it fails to back that claim up with any persuasive analysis. The mere fact that Crane felt it needed to call a witness to respond to the evidence does not show prejudice under section 352. Crane’s argument that the 1983 warning label was too remote in time from Lewis’s “earliest asbestos exposures” is equally unpersuasive. Lewis continued to work at Mare Island well past 1983. In any event, the passage of time would not weaken the probative force of the warning label evidence unless the product’s safety characteristics changed in the interim.

Regarding the brochure, Crane argues that the word “safer” does not necessarily imply that the comparison products were unsafe. That is an issue of semantics, not a ground for excluding the evidence. The brochure was relevant as an admission by Crane of a safety issue concerning its asbestos products, and to contradict Crane’s position that the asbestos in its products presented no health risks. The trial court did not abuse its discretion in admitting it.

---

<sup>10</sup> Evidence Code section 1151 provides: “When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event.”

#### **D. Calculation of Settlement Credit**

The jury awarded Lewis \$1,696,132 in economic damages for lost income and medical expenses. After trial, plaintiffs moved for an order determining how much of the pre-verdict settlement funds plaintiffs received from other defendants should be offset against Crane's liability for Lewis's economic damages. Both parties appeal from the resulting order.

Crane contends that the trial court attributed too high a portion of the settlement to potential wrongful death claims of Lewis's heirs, thereby understating the credit to which it is entitled. Plaintiffs argue the court followed the wrong formula and attributed too little of the settlement to Shirley Hackett's loss of consortium claim, thereby overstating Crane's credit. We find merit in plaintiffs' position.

#### **Background**

In addition to the economic damages awarded to Lewis in this case, the jury also awarded Lewis noneconomic damages of \$2 million for his pain and suffering and awarded his spouse, Shirley Hackett, \$1.25 million in noneconomic damages for her loss of consortium damages incurred between the time of Lewis's diagnosis and his death.<sup>11</sup>

Civil Code section 1431.2, subdivision (a), provides: "In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount." This section, enacted by the voters in 1986 as part of Proposition 51, has been held applicable to strict liability asbestos exposure cases. (See *Wilson v. John Crane, Inc.* (2000) 81 Cal.App.4th 847, 852-859 (*Wilson*); *Arena v. Owens-Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1197.)

---

<sup>11</sup> Lewis died after judgment was entered in this case.

Under Proposition 51, Crane is jointly and severally liable for the full amount of Lewis's economic damages along with all other defendants found to be at fault. However, as to Lewis's and Hackett's combined noneconomic award of \$3.25 million, Crane is liable only to the extent of its percentage share of comparative fault as determined by the jury, 18.5 percent.

Prior to trial, Lewis and Hackett entered into a series of settlement agreements with other defendants. These agreements purported to settle any and all claims arising from Lewis's exposure to asbestos, including Lewis's personal injury claims, Hackett's loss of consortium claims, and any wrongful death claims that might be brought against the settling defendants in the future by Hackett and by Lewis's two sons. None of the settlement agreements allocated the total amount to be paid between economic and noneconomic damages or among the different potential claimants. With the exception of a single settlement agreement signed by Lewis's older son, Lewis's children did not sign the agreements. However, the settlements included agreements whereby Lewis and Hackett, for themselves and their estates, promised to hold the settling defendants harmless against any potential wrongful death claims brought by Lewis's heirs.

Under Code of Civil Procedure section 877, Crane was entitled to a credit against its liability for Lewis's economic damages for any portion of the plaintiffs' settlement proceeds that were properly attributable to Lewis's economic damages claims. (See *Espinoza v. Machonga* (1992) 9 Cal.App.4th 268, 271-277 (*Espinoza*).) *Espinoza* was a personal injury case in which one of the codefendants settled before trial for the payment of an amount not allocated between the plaintiff's economic losses and his noneconomic, pain and suffering claim. Plaintiff then obtained a judgment against a nonsettling defendant. Economic damages comprised 29 percent of the total judgment. The Court of Appeal held that for purposes of calculating the credit the nonsettling defendant was entitled to for the plaintiff's economic damages, 29 percent of the settlement should be attributed to economic damages to mirror the factfinder's apportionment of damages. (*Id.* at pp. 276-277.) The *Espinoza* approach to allocating pre-verdict settlements is now well established. (*Ehret v. Congoleum Corp.* (1999) 73 Cal.App.4th 1308, 1320.)

*Espinoza, supra*, 9 Cal.App.4th 268 is easy to apply when the claims that are settled and the claims that proceed to trial against the nonsettling defendants are identical personal injury claims. In our case, the settlements and verdict encompassed overlapping but not identical damages. The settlements covered the heirs' potential future wrongful death claims, which were not part of the trial, and also covered the spouse's pre-death, loss of consortium claim. How these complicating factors affect the calculation of a settlement credit was addressed in *Wilson, supra*, 81 Cal.App.4th at page 864 in a factual settling closely resembling the present case.

*Wilson, supra*, 81 Cal.App.4th 847 was an asbestos exposure case in which the jury had rendered a verdict against Crane for damages based on the husband's personal injury damages and the wife's loss of consortium. Pre-verdict settlements reached with other defendants purported to encompass the husband's personal injury claims, the wife's loss of consortium claim, and the potential future wrongful death claims of the heirs. The trial court had accepted as reasonable the following allocation of plaintiff's \$1.16 million pre-trial settlement with other defendants: 60 percent to husband's personal injury claims, 20 percent to wife's loss of consortium claim, and 20 percent to potential future wrongful death claims by husband's heirs. As in this case, the parties disputed the proper method of calculating a credit for economic damages. (*Id.* pp. 859, 860-866.)

*Wilson* held that the credit should be calculated as follows (see 81 Cal.App.4th at p. 864, fn. 18): First, excluding the wife's loss of consortium damages, determine the ratio of economic to total damages as awarded by the jury. Second, subtract from the amount of the pre-trial settlement the portions of the settlement properly found to be allocable to the wife's loss of consortium claim and the heirs' potential wrongful death claims. Third, multiply the two figures together to determine the amount of the defendant's settlement credit for economic damages.

The trial court followed the *Wilson* methodology in this case. First, it determined that the ratio of economic to total damages awarded to Lewis was 0.458. Then it determined that 34 percent of the pretrial settlement amount was properly allocable to the heirs' potential future wrongful death claims, and 15 percent was allocable to Hackett's

loss of consortium claim. After subtracting these amounts from the plaintiffs' settlement proceeds of \$4,592,248 and multiplying the remainder by 0.458, the court computed that Crane was entitled to a settlement credit of \$1,072,657 against economic damages and reduced the judgment amount accordingly.

#### Allocation to Wrongful Death Claims

Crane does not challenge the use of the *Wilson* formula (81 Cal.App.4th at p. 864, fn. 18), but argues that the trial court's allocation of 34 percent of the settlement total (\$1,561,364) to potential wrongful death claims was excessive. Its sole argument in this regard is that the court failed to take into account that Lewis's sons are not signatories to the settlement agreements and are therefore effectively free to pursue wrongful death claims against the settling defendants in the future. If so, then little if any of the consideration paid to Lewis and Hackett in settlement should have been allocated to the son's claims.

We are unpersuaded by this argument. Lewis entered into hold harmless agreements with the settling defendants on behalf of himself and his estate. Although it is theoretically possible that the sons could sue *and* that no settlement proceeds would be left to fulfill the hold harmless agreement *and* that the defendants would not prevail under any one of several possible grounds for claiming an offset, it is plain that the settling defendants did not believe they were paying \$4.5 million for an empty promise. The agreements make it clear that the settling defendants believed and expected there would be no future claims by the heirs. Crane advanced a similar contention in the *Wilson* case. The court was not sufficiently troubled by the remote possibility of a suit by the heirs to reject the plaintiffs' allocation of 20 percent of the settlement in that case to wrongful death claims. (*Wilson, supra*, 81 Cal.App.4th at pp. 862-863.)

Here, there was ample evidence in the record to support the trial court's allocation of 34 percent of the settlement to the heirs' potential future wrongful death claims. The trial court noted that Lewis was a kind and attentive father and that he had a close relationship with his wife and sons. One of his sons was only nine years old when Lewis died. Lewis's life expectancy was shortened by approximately 26 years as a result of his

disease. As plaintiffs pointed out to the trial court, allocations of 50 to 70 percent of prior settlements to wrongful death claims were not uncommon in cases brought by much older plaintiffs and by plaintiffs with no minor children. (See, e.g., *Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164 [upholding 50-percent allocation for worker diagnosed at age 73 with no minor children].)

The trial court has wide discretion in allocating portions of a prior settlement to claims not adjudicated at trial. (See *North County Contractor's Assn. v. Touchstone Ins. Services* (1994) 27 Cal.App.4th 1085, 1095.) On the record before us, allocating 34 percent of the prior settlement amount to the heirs' potential wrongful death claims is not an abuse of discretion.

#### Plaintiffs' Cross-Appeal

Plaintiffs assert that the settlement credit given to Crane is overstated by \$42,025. Contrary to Crane's contention, we find that plaintiffs expressly reserved their right to pursue this contention on appeal.

According to plaintiffs, the *Wilson* formula (81 Cal.App.4th at p. 864, fn. 18) utilized by the trial court here incorrectly excludes loss of consortium damages, both in calculating the ratio of economic to total damages awarded by the jury, and in determining the portion of prior settlements to which that ratio applies. Plaintiffs contend that the correct ratio of economic to total damages awarded by the jury is 0.34, based on including loss of consortium as part of total damages in the denominator. To correctly compute Crane's settlement credit for economic damages, this percentage must be multiplied by \$3,030,884 (the total of the prior settlements less the amount the trial court attributed to the heirs' potential wrongful death claims).

We conclude that *both* plaintiffs' proposed formula *and* the *Wilson* formula are correct and yield identical results if the amount of the settlement attributable to loss of consortium damages is correctly determined in light of the *Espinoza* line of cases. As

explained below, we calculate that Crane’s settlement credit for economic damages was overstated by \$33,367.<sup>12</sup>

*Greathouse v. Amcord, Inc.* (1995) 35 Cal.App.4th 831 (*Greathouse*) involved wrongful death claims by the wife and children of a construction contractor who had died of an asbestos-related disease. Prior to trial, the heirs settled with all but one of the defendants. The settlement agreements prepared by plaintiffs’ counsel purported to allocate 80 percent of the pre-verdict settlements to noneconomic damages and only 20 percent to economic damages. In contrast, the jury’s later damage award against the nonsettling defendant consisted of 74.3 percent economic damages for the heirs and 25.7 percent noneconomic damages. Despite the jury’s verdict, the trial court granted plaintiffs’ motion to allocate the pre-verdict settlement according to the percentages recited in the agreements.

We held that this was error because plaintiffs’ allocation motion asked the trial court to rule on an issue that had already been decided by the jury: “By allocating the ‘total amount of damages’ between economic and noneconomic damages, the jury made a determination as to the economic or noneconomic character of the indivisible injury which was directly applicable to the portion of the damages paid under the pretrial settlement. [¶] . . . [T]he trial court was justified in inquiring only if there was a reasonable basis for the jury’s allocation of total damages between economic and noneconomic damages. [Citation.] If the allocation was supported by substantial evidence, it should have allocated the settlement proceeds between economic and noneconomic damages according to the proportion reflected in the jury’s verdict. Any other allocation would necessarily infringe on the factfinding power of the jury. [Citation.]” (*Greathouse, supra*, 35 Cal.App.4th at pp. 840-841.)

---

<sup>12</sup> The net settlement credit we calculate is nearly \$9,000 higher than that calculated by plaintiffs. Plaintiffs round the economic damages ratio down from 0.3429 to 0.34. When applied to a multimillion-dollar settlement, this slight percentage difference produces too large a difference in the settlement credit to ignore.

In *Wilson*, the defendant took the position, citing *Espinoza, supra*, 9 Cal.App.4th 268 and *Greathouse, supra*, 35 Cal.App.4th 831, that the amount of the settlement attributable to loss of consortium should be based on the jury's award of loss of consortium damages, not on the trial court's independent determination of the amount. (*Wilson, supra*, 81 Cal.App.4th at pp. 863-866.) The *Wilson* court did not reach this issue because it found that the side advancing it (ironically, the same party opposing it in this case) would not benefit by its application. (*Id.* at p. 866.) We do reach the issue and agree with plaintiffs that Crane's settlement credit was overstated to their detriment because the trial court made its own estimate of loss of consortium damages rather than relying on the percentage reflected in the jury's verdict.

Crane points out that no case has held that the allocation of a prior settlement to a spouse's loss of consortium claim must be in exact proportion to the jury's award of loss of consortium damages. However, that is a distinction without a difference. Loss of consortium is simply a label for one type of noneconomic damages. As long as claims for such damages were encompassed by the prior settlements and the amount of the damages were determined by the factfinder, they are logically indistinguishable from any other noneconomic damages for purposes of applying *Espinoza, supra*, 9 Cal.App.4th 268.

Of the total damages caused by Lewis's personal injury, the jury attributed 34.29 percent to economic damages and 65.71 percent to noneconomic damages however labeled. As the parties recognize, simply taking 34.29 percent of the full amount of prior settlements as the allowable credit against Crane's economic damages liability would overstate the credit. The settlements include amounts attributable to the value of the heirs' potential wrongful death claims. These claims were not tried to the jury and nothing in the jury's verdict reflects upon their value relative to Lewis's economic damages. Thus, the trial court correctly adjusted the amount of the settlement by subtracting its estimate of the percentage allocable to the heirs' potential wrongful death claims (34 percent of the total settlement) before calculating Crane's settlement credit.

As discussed above, the trial court did not abuse its discretion in attributing a settlement value of \$1,561,364 to these claims.

We find that Crane should have been given a credit of \$1,039,290 against the jury's economic damages award. This figure is reached by first subtracting the amount of the prior settlements attributable to the wrongful death claims (\$1,561,364) from the total of the prior settlements (\$4,592,248), and then multiplying the result by the 34.29 percent of the jury's total verdict against Crane comprising economic damages. Although this method of calculating the settlement credit appears on the surface to be different from that utilized in *Wilson, supra* (81 Cal.App.4th at p. 864, fn. 18), the two methods are in fact identical in mathematical substance and produce the same result when correctly applied.<sup>13</sup>

In sum, when the jury awards economic damages to the injured plaintiff as well as loss of consortium damages to the spouse, and there are pre-verdict settlements embracing such damages, the principles established in *Espinoza, supra*, 9 Cal.App.4th 268 and *Greathouse, supra*, 35 Cal.App.4th 831 require the trial court to apply the ratios established by the jury's verdict to apportion the settlement amounts between economic and noneconomic damages.<sup>14</sup> This can be accomplished most directly by multiplying the jury's ratio of economic to total damages (including loss of consortium) by the portion of the total settlement allocable to damage claims actually adjudicated by the jury's verdict.

---

<sup>13</sup> Thus, in this case, 25.27 percent ( $\$1.25 \text{ million} \div \$4,946,132$ ) of the jury's total damage award against Crane was for Hackett's loss of consortium. If this ratio is multiplied by the non-wrongful death portion of the settlement (\$3,030,884), the resulting product (\$765,904) is the amount of the settlement that is properly allocable to loss of consortium, i.e., an allocation based on the jury's verdict rather than the court's discretion. When this allocation is used in the *Wilson* formula, the settlement credit so calculated is the same as that computed under plaintiffs' approach, except for slight differences caused by rounding off the ratios used. Both methods eliminate noneconomic damages in computing the nonsettling defendant's credit, but each takes a slightly different arithmetic route to that destination.

<sup>14</sup> Credits for post-verdict settlements are governed by different principles. (See *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 37-42.)

Alternatively, the court can apply the approach used in *Wilson, supra*, (81 Cal.App.4th at p. 864, fn. 18) of subtracting loss of consortium from both the jury's verdict and the prior settlements. However, the amount of the settlement attributed to loss of consortium for purposes of applying *Wilson* must be based on the jury's relative valuation of the loss of consortium claim rather than on the trial court's independent exercise of discretion. Under either approach, the trial court retains discretion in determining the portion of the settlements to allocate to noneconomic damages claims, such as the heirs' potential wrongful death claims in this case, that are covered by pre-verdict settlements but not adjudicated by the jury.

Accordingly, we will modify the judgment to reduce Crane's credit for economic damages by \$33,367. Lewis's net verdict for economic damages will increase to \$656,842, and the total damages awarded to him by the judgment will be adjusted to \$1,026,842.

#### **E. Expert Witness Fees<sup>\*</sup>**

Before trial, Hackett offered to settle her loss of consortium claim against Crane for \$25,000 pursuant to Code of Civil Procedure section 998 (section 998). Crane declined. The jury returned a verdict of \$1,250,000 in loss of consortium damages in her favor, and found the percentage of comparative fault assigned to Crane under Proposition 51 to be 18.5 percent (or \$231,250).

The trial court awarded Hackett her expert witness fees of \$72,239, as permitted by section 998.<sup>15</sup> Crane appeals from the award of fees, asserting that Hackett's section 998 settlement offer was not made in good faith. We affirm the award.

The fact that Crane failed to obtain a judgment more favorable than Hackett's demand is *prima facie* evidence that the demand was made in good faith. (*Elrod v.*

---

<sup>\*</sup> See footnote, *ante*, page 1.

<sup>15</sup> Section 998 provides that if an offer made by a plaintiff in accordance with its terms is not accepted "and the defendant fails to obtain a more favorable judgment . . . , the court . . . in its discretion, may require the defendant to pay a reasonable sum to cover costs of the services of expert witnesses . . . ." (§ 998, subd. (d).)

*Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 700.) Crane had the burden of proving that the demand was *not* in good faith. (*Ibid.*) This court will not disturb the trial court's resolution of this issue absent an abuse of discretion. (*Mesa Forest Products, Inc. v. St. Paul Mercury Ins. Co.* (1999) 73 Cal.App.4th 324, 329.)

Crane asked the trial court to infer that Hackett's settlement demand must have been in bad faith because it was not accompanied by a section 998 demand from Lewis. The law imposes no such requirement. Moreover, Crane fails to prove that Hackett had no reasonable expectation that Crane would accept a \$25,000 offer that would have saved it from a dramatically higher exposure to damages.

We find no abuse of discretion in the trial court's award of expert witness fees to Hackett.

### **III. DISPOSITION**

The judgment in favor of Lewis is increased to \$1,026,842 and, as so modified, is affirmed. The trial court's October 27, 2000 order awarding expert witness fees is affirmed. Respondents and appellants, Mark Lewis and Shirley Hackett, shall recover their costs on appeal.

---

Margulies, J.

We concur:

---

Stein, Acting P.J.

---

Swager, J.

Trial Court:

San Francisco County Superior Court

Trial Judge:

Hon. Diane Elan Wick

Attorneys for Plaintiffs and  
Appellants, Mark Lewis et al:

Daniel Upham Smith, Esq.

Wartnick, Chaber, Harowitz & Tigerman  
Harry F. Wartnick, Esq.  
Stephen M. Tigerman, Esq.

Attorneys for Defendant and  
Appellant John Crane, Inc.:

Hassard Bonnington LLP  
Philip S. Ward, Esq.  
Helene E. Swanson, Attorney